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507997—43

In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 621

BAYSIDE BUS CORPORATION

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The findings of fact and conclusions of law of the District Court of the United States for the Southern District of New York (R. 77–81), entered without opinion, are unreported. The opinion of the United States Circuit Court of Appeals for the Second Circuit (R. 90–93) is not yet officially reported.

JURISDICTION

The judgment of the United States Circuit Court of Appeals for the Second Circuit (R.

100) was entered on November 25, 1942. A petition for rehearing (R. 94–98) was denied November 25, 1942 (R. 99). The petition for a writ of certiorari was filed on January 4, 1943. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

The questions presented are:

1. Whether the United States was guilty of breaching the contracts entered into with the petitioner whereby the ~~respondent~~ Petitioner agreed to furnish transportation to certain federal workers. This question, in turn, depends on whether the United States guaranteed that a specified number of workers were to be transported or whether the United States contracted to pay only for the number of workers which were in fact transported.

2. Whether, if the contracts were breached, any damage resulted for which petitioner is entitled to recover.

STATEMENT

In January and February 1939, the United States entered into three contracts with petitioner for the transportation by bus of W. P. A. workers between St. George, Staten Island, New York, and certain designated zones in Staten Island, during

the months of January, February, and March, 1939, at specified rates per capita for one way trips, the rates varying with the different zones (R. 2–8, 10–13, 28, 60, 62).

Each contract (known as "purchase order") provided that (R. 11, 60, 62):

> Payment will be made only for the exact number of passengers transported in accordance with all the terms of the contract at the price quoted herein.

Each contract included a table showing the "Estimated Daily Average Number of Passengers" for each zone (R. 13, 60, 62) and the statement that (R. 16, 60, 62):

> The aforesaid number of workers is approximate only and cannot be guaranteed. However, successful vendor will be notified by 12:00 noon of the number of passengers to be carried the following day, subject to a variance of 10% more or less, although vendor's acceptance of notice by noon of the previous working day of a greater modification than 10% will be held binding.
>
> Vendor will supply sufficient buses to conform to schedules hereinbefore mentioned, and will also have available a reserve of 10% to meet contingencies.

Petitioner owned five buses "licensed" for the job, and used "three or four" of these buses (R. 49). Most of the buses used were furnished by

subcontractors,[1] who were procured by petitioner to assist in the performance of his undertaking at an originally stipulated compensation of $18 per day per bus, subject to certain deductions for funds laid out by petitioner principally for maintenance and the salaries of two supervisors (R. 41, 43, 49–50).

On January 10, 1939, several days after petitioner began performance, petitioner wrote to the contracting officer, complaining that the number of passengers carried was almost 25% lower than the daily estimates furnished by W. P. A. and asking whether some arrangement could be made to compensate the "carrier" on a "service" or "stand-by" basis when equipment "put in readiness" pursuant to the W. P. A. estimates was not utilized (R. 29, 65–69). Subsequently, during the eight weeks succeeding the inception of performance, petitioner discussed the matter with a number of Treasury and W. P. A. officials, in order to try "to find some equitable solution"; it did not, however, see either the contracting officer, or the assistant who signed the "purchase orders" on

[1] The following chart shows the number of buses supplied by petitioner and by the subcontractors during each of the two-week periods covered by the purchase orders:

	Petitioner	*Subcontractors*
January 1–15	4	25
January 16–31	4	12
February 1–15	4	8
February 16–28	4	9
March 1–15	3	9
March 16–31	4	9

his behalf (R. 29–33). The Government officials advised petitioner that it would be paid only for passengers actually carried (R. 30–31, 32, 40–41), and petitioner was furnished a form on which to bill the Government for such passengers (R. 33, 34–35). Thereafter petitioner submitted invoices covering only the number of passengers carried (R. 35, 37, 38, 70–75), and never invoiced the Government or made any written demand for any additional payments (R. 40, 45–46). Petitioner's first oral demand for additional payment was made in February 1939 (R. 40).

When it appeared that the number of passengers carried varied more than 10% under the W. P. A. estimates, petitioner, within the first two weeks of January 1939, effected a modification of its arrangements with the subcontractors, whereby they agreed to accept, instead of $18 per day per bus, per capita payments for passengers actually carried at the rates specified in the "purchase orders" (R. 42–44).[2] Petitioner promised the subcontractors that he would compensate them if he subsequently recovered any additional funds from the Government (R. 43). Petitioner never paid any of the subcontractors the $18 per day, but paid them all at the "purchase order" rates, for the actual number of

[2] Petitioner testified that all of its contracts with the subcontractors were oral (R. 46–49), and submitted no documents bearing on its relations with the subcontractors.

passengers they carried, subject to pro rata deductions for "exactly the cost" petitioner sustained for storage, supervisors' salaries and social security and unemployment insurance taxes (R. 44, 46, 48, 49, 52, 53, 76). Twice during January 1939, buses prepared for use and supplied by subcontractors were returned to the garages (R. 53).[3]

Petitioner claims as damages the per capita rate for the variance in the number of passengers actually carried and the number represented by 90% of the estimates furnished by W. P. A. (R. 25, 91). The District Court dismissed on the grounds that respondent was obligated to pay only for passengers actually transported and had fully performed its contract; that there was an accord and satisfaction between petitioner and respondent by virtue of petitioner's submission of invoices only for the number of passengers actually carried, without protest or reservation of any claim for damages; and that petitioner had suffered no damage by reason of any alleged breach of the contracts. The court below affirmed the judgment, holding that while there was a breach of contract, any resulting loss was borne by the subcontractors, and accordingly that since petitioner had proved no damages, its complaint had been properly dismissed (R. 90–93).[4]

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[3] Only one witness, its president, was offered by petitioner.

[4] One judge concurred, agreeing with the view of the District Court that there was no breach of contract (R. 93).

ARGUMENT

No question of substantial or general importance is involved. The rules concerning the construction of contracts are not in dispute and there is no conflict of decisions; the only issues are whether under the particular circumstances the petitioner established a breach of contract entitling it to recover.[5] In any event, petitioner's contentions are erroneous.

1. Respondent committed no breach of contract. The contracts provide that "payment will be made only for the exact number of passengers transported in accordance with all the terms of the contract at the price quoted herein" (R. 11). This unequivocal statement of the obligation assumed by the Government was not modified by the subsequent provisions regarding notice, which themselves embody an explicit disavowal of any guarantee of the number of workers to be transported (R. 16). Even in the absence of such an express disclaimer, the effect of the notice provisions would have been merely "to signify a purpose on the part of the government" without binding the Government to pay for any minimum amount of transportation. *Bulkley* v. *United States,* 19 Wall. 37, 40. *Cf. Lobenstein* v. *United States,*

[5] The dismissal of a complaint does not warrant reversal where only nominal damages could be recovered and no costs would follow. *United States* v. *Withers,* 130 Fed. 696, 698 (C. C. A. 2).

91 U. S. 324, 330; *Brawley* v. *United States*, 96 U. S. 168, 170, 174.

That this was the purport of the agreement is reenforced by the practical interpretation given it by the parties, which is entitled to great weight. *Insurance Co.* v. *Dutcher*, 95 U. S. 269, 273; *Merriam* v. *United States*, 107 U. S. 437, 441, 444. Petitioner's conduct clearly indicates its understanding that the contract imposed no burden upon the Government beyond the obligation to pay for passengers actually transported.[6]

Further, throughout the life of the agreement petitioner invoiced the Treasury Department only for the passengers actually carried, for which it was paid (R. 33, 35, 38); petitioner did not at any time make a written demand or submit invoices for payment on account of passengers which it was prepared to, but did not in fact, transport (R. 45, 46). There is no evidence that petitioner ever protested or reserved any claim for

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[6] One week after the execution of the first contract, petitioner wrote to the contracting officer, complaining that the that the actual number of passengers transported did not come within ninety per cent of the daily estimates received from W. P. A. and asking (R. 68):

> * * * Cannot some arrangement be made whereby the "carrier" is compensated either on a "service" or "stand-by" basis when equipment is put in readiness on the basis of an estimate submitted by the Works Progress Administration and then is not used? * * *

damages concerning the matters alleged in its complaint. The interpretation petitioner now puts upon the contract is an afterthought, and is not the interpretation put upon it by the parties when it was executed. *Cf. Merriam* v. *United States,* 107 U. S. 437, 444; see *Chas. Nelson Co.* v. *United States,* 56 C. Cls. 448, 458, *affirmed,* 261 U. S. 17, 23, 24.

2. Even assuming that respondent committed a breach of the contracts to the extent that the passengers carried fell below 90% of the W. P. A. estimates, the judgment below was correct. Petitioner proved neither actual damage nor loss of profits, the only possible items of recovery for the alleged breaches. *Cf. United States* v. *Behan,* 110 U. S. 338, 344–345. It did not seek to prove any out-of-pocket damage on its own part.[7] The

[7] Petitioner's president testified that it supplied at its own expense a repair man to service the buses and inspect them for conformity with the rules of the Transit Commission, and also "accounting" services and his own supervision (R. 44–45); in addition, that during January and February, petitioner stood the contract penalty—i. e., no payment—for late arrivals (R. 16–17, 51). However, no effort was made to show the amount to which this came or whether these expenses would have followed even in the absence of the alleged breaches. Petitioner is not entitled to have the cause remanded to allow it to prove matters which it made no effort to prove at the trial. *Cf. United States* v. *Rodiek,* 120 F. (2d) 760, 762 (C. C. A. 2), *affirmed,* 315 U. S. 783, rehearing denied, 316 U. S. 707; *Coghlan* v. *South Carolina R. R.,* 142 U. S. 101; *Keator Lumber Co.* v. *Thompson,* 144 U. S. 434.

record indicates that the four buses supplied by petitioner itself for use on the job were all steadily employed except for the first two weeks in March, when three were used, and is silent as to the reason for this variation. In any event, taking into account the number of passengers who were carried and petitioner's arrangement with the subcontractors, any failure on its part to make full use of its own buses was voluntary. Not less than twelve buses were required in any of the two-week periods during the life of the undertaking and petitioner had only five "licensed" for the job.

The measure of profits for performance offered, but not rendered, is "the difference between the cost of doing the work and what (petitioner) was to receive for it". *United States* v. *Behan,* 110 U. S. 338, 345. Petitioner concedes that it made no attempt to show the profits, if any, which it would have made had the estimates been accurate and had the sub-contractors been paid on the original basis (R. 97–98). Further, under the facts at bar petitioner could scarcely show a loss of profit. In the first two weeks of its undertaking, before it could have known how accurate the future estimates would be, petitioner chose to protect itself against the risk of loss by rearranging its basis of dealing with the subcontractors in preference to proceeding on the original basis in anticipation

of ultimate recovery from the Government. By so doing petitioner disabled itself from realizing any profits on the passengers carried in the subcontractors' buses.

The offer of proof as to losses suffered by the subcontractors on account of the alleged breaches (R. 53–55), was properly excluded by the District Court, since there was no showing that petitioner was obliged to, or did in fact, reimburse the subcontractors.[8] *Cf. City of New York* v. *Selden,* 255 Fed. 317 (C. C. A. 2); *United States* v. *Cowden Mfg. Co.,* 312 U. S. 34. To permit petitioner to recover for the losses of the subcontractors would subject the United States to liability to complete strangers with whom it had never contracted and who could not themselves have sued the United States. *Cf. Merritt* v. *United States,* 267 U. S. 338, 340.

In the circumstances, petitioner has failed to prove that it suffered any damage in consequence of the alleged breaches of contract, whatever the losses of the subcontractors may have been, and is thus not entitled to any recovery. *Cf. City of New York* v. *Selden,* 255 Fed. 317 (C. C. A. 2); *Degnon Contracting Co.* v. *City of New York,* 235 N. Y. 481.

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[8] As the court below concluded (R. 92), there is no proof that the petitioner was ever bound to order buses from the subcontractors, or the latter to supply them, the record suggesting instead a series of offers by the former, accepted from time to time by the latter.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

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